U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8163490

Date: APR. 19, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as an individual of exceptional ability in the arts, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not qualify for classification as an individual of exceptional ability, and that she had not had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The matter is now before us on appeal.

The Petitioner has requested to withdraw the appeal. We will grant the request and enter a finding of willful misrepresentation of a material fact.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or

> educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. REQUEST FOR WITHDRAWAL OF THE APPEAL

After a preliminary review of the record, we notified the Petitioner of our intent to dismiss the appeal with a finding of willful misrepresentation of a material fact based on various adverse findings. The Petitioner subsequently asked to withdraw the appeal. A withdrawal may not be retracted and may not be refused. 8 C.F.R. § 103.2(b)(6); *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976). Accordingly, the Petitioner's request will be granted, and the appeal will be dismissed based on that withdrawal.

III. WILLFUL MISREPRESENTATION

As mentioned above, we sent the Petitioner a notice of intent to dismiss (NOID) the appeal based on findings outside of the record of proceeding. By issuing a NOID, we gave the Petitioner an opportunity to respond to the adverse findings, as required by 8 C.F.R. § 103.2(b)(16)(i). We also advised the

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

Petitioner that, if she did not overcome the adverse findings, then we would make a finding of willful misrepresentation of a material fact. We further advised that, while the Petitioner had the right to withdraw the petition, such a withdrawal would not prevent a finding of willful misrepresentation of a material fact. The Petitioner responded to the NOID with a request to withdraw the appeal and did not address the adverse findings in any way. For the reasons discussed below, we find that the Petitioner willfully misrepresented her authorship of two books, which is material to the adjudication of the instant petition.

A. Evidence of Record

The Petitioner claims to be an individual of exceptional ability in the arts and that she satisfies the requirements of the *Dhanasar* analytical framework.

As documentation of her exceptional ability and that she is well positioned to advance her proposed endeavor, the Petitioner submitted [redacted] a book which she claims to have written, and which was purportedly published in 2015.[4] The book consists of sections entitled '[redacted]' As discussed in our NOID, further research did not corroborate the Petitioner's claimed authorship of this book. USCIS has determined that the aforementioned sections of her book are identical to those found in an article, entitled [redacted] that was written by [redacted] and published in January 2013.[5]

The Petitioner also presented [redacted] a book which she claims to have written, and which was purportedly published in 2018.[6] The book consists of sections entitled "Introduction," [redacted] As indicated in our NOID, further research did not corroborate the Petitioner's claimed authorship of this second book. USCIS has determined that the "Introduction" section of her book contains identical language to that from a February 2015 article published by [redacted] In addition, the [redacted] sections of the Petitioner's book have identical language to that of an article, entitled [redacted] that was written by [redacted] and published in 1998.[8]

Based on the above, the Petitioner has falsely claimed authorship of the books she submitted as evidence of her exceptional ability and of her position to advance the proposed endeavor.

B. Analysis

The facts and evidence presented in the instant matter warrant a finding of willful misrepresentation of a material fact against the Petitioner.

[4] The title page for this book lists its publication date as "February 2015."
[5] *See* http:[redacted] (last visited February 5, 2021).
[6] The title page for this book lists its publication date as "March 2018."
[7] *See* https[redacted] (last visited February 5, 2021).
[8] *See* https:[redacted] (last visited February 5, 2021).

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the foreign national willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *See Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

USCIS will deny a visa petition if the petitioner submits evidence which contains false information. In general, a few errors or minor discrepancies are not reason to question the credibility of a foreign national or an employer seeking immigration benefits. *See Spencer Enters. Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir. 2003). However, if a petition includes serious errors and discrepancies, and the petitioner does not resolve those errors and discrepancies given the opportunity to rebut or explain, then the inconsistencies will lead USCIS to conclude that the claims stated in the petition are not true. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In this case, the discrepancies in the documents relating to the petition constitute substantial and probative evidence. The Petitioner submitted falsified evidence purporting to show her authorship, which is material both to her exceptional ability in the arts and her eligibility under the *Dhanasar* analytical framework. When given an opportunity to rebut our findings, the Petitioner offered no rebuttal or explanation for the inconsistencies and instead withdrew the petition. If the Petitioner had not withdrawn the appeal, we would have dismissed the appeal based on these misrepresentations. *See Cintron*, 16 I&N Dec. at 9; *see also* 8 C.F.R. § 103.2(b)(14).

Beyond the adjudication of the visa petition, a misrepresentation may lead USCIS to enter a finding that an individual foreign national sought to procure a visa or other documentation by willful misrepresentation of a material fact. This finding of fact may lead USCIS to determine, in a future proceeding, that the foreign national is inadmissible to the United States based on the past misrepresentation.

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), provides:

> Misrepresentation – (i) In general – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

To find a willful and material misrepresentation in visa petition proceedings, an immigration officer must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Kai Hing Hui*, 15 I&N Dec. at 288.

First, the Petitioner submitted plagiarized material (books she claims to have authored) intended to falsely create the appearance of her exceptional ability in the arts and that she is well positioned to advance her proposed endeavor. For example, in a signed statement accompanying the petition in which the Petitioner discussed her "achievements in the field of embroidery," she asserted: "In 2015, I authored and published a book entitled [redacted]' The Petitioner's submission of these falsified books in support of her immigrant visa petition constitutes a false representation to a government official.

Next, we find that the Petitioner willfully made the misrepresentations. The Petitioner has not asserted that she believed the books to be authentic, nor explained how she came to be in possession of them. When given the opportunity to address our findings, the Petitioner withdrew the appeal rather than offering any explanation or rebuttal that she submitted the evidence accidentally, inadvertently, or in an honest belief that the assertions previously offered in support of the petition were true.

Furthermore, the Petitioner signed Form I-140, Immigrant Petition for Alien Worker, certifying under penalty of perjury that the visa petition and the submitted evidence are all true and correct. *See* section 287(b) of the Act, 8 U.S.C. § 1357(b); *see also* 8 C.F.R. § 103.2(a)(2). Accompanying the signed petition, the Petitioner submitted the books as evidence in support of the petition. Part 8 of Form I-140 requires a petitioner to make the following affirmation: "I certify, under penalty of perjury of the United States of America, that this petition and the evidence submitted with it are all true and correct." On the basis of this affirmation, made under penalty of perjury, we find that the Petitioner willfully and knowingly made the misrepresentations.

Third, the misrepresented facts are material. To be considered material, a false statement must be shown to have been predictably capable of affecting the decision of the decision-making body. *Kungys v. U.S.*, 485 U.S. 759 (1988). The regulation at 8 C.F.R. § 204.5(k)(3)(ii) calls for evidence "that the alien is an alien of exceptional ability in the sciences, arts, or business." In addition, one of the requirements set forth in the *Dhanasar* precedent decision is that the foreign national is well positioned to advance the proposed endeavor. *Id.* at 889. As evidence of the Petitioner's exceptional ability in the arts and she is well positioned to advance her proposed endeavor, she submitted [redacted] Here, the Petitioner's misrepresentations could have affected the outcome of the petition because they purported to address, and to satisfy, her eligibility under section 203(b)(2) of the Act. In light of the falsified evidence we described above and in the NOID, we find that the Petitioner's misrepresentations were material to her eligibility.

IV. CONCLUSION

By filing the instant petition and falsely claiming authorship of two books, the Petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. This finding may be considered in any future proceeding where admissibility is an issue. While the Petitioner has chosen to withdraw her appeal, this does not negate our finding that she sought to procure immigration benefits through willful misrepresentations of material facts, which may render her inadmissible in future proceedings.

ORDER: The appeal is dismissed based on its withdrawal by the Petitioner.